

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

**In re: PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESALE PRICE  
LITIGATION**

**MDL No. 1456  
Master File No. 01-CV-12257-PBS**

**THIS DOCUMENT RELATES TO:**

*United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., et al. v. Dey, Inc., et al.*, Civil Action No. 05-11084-PBS

**Hon. Patti B. Saris**

**DEY DEFENDANTS' MOTION TO AMEND THE COURT'S JULY 17, 2007  
MEMORANDUM AND ORDER TO INCLUDE A CERTIFICATION OF  
AN IMMEDIATE APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**

Defendants Dey, Inc., Dey L.P., Inc., and Dey, L.P. (collectively “Dey”), by their attorneys, Kelley Drye & Warren LLP and Foley Hoag LLP, move the Court to amend its Memorandum and Order of July 17, 2007 (“July 17 Order”) to include a certification, pursuant to 28 U.S.C. § 1292(b), permitting Dey to seek leave to immediately appeal the July 17 Order to the United States Court of Appeals for the First Circuit.

In support of this motion, Dey states as follows:

1. The July 17 Order involves controlling questions of law relating to, among other issues, the applicable statutes of limitation set forth in 31 U.S.C. § 3731(b), including the question of when an action is commenced for purposes of 31 U.S.C. § 3731(b) and whether a complaint-in-intervention filed by the United States in a *qui tam* action may relate back to the filing of the relator’s complaint under Rule 15(c)(1) of the Federal Rules of Civil Procedure.

2. There exists substantial grounds for difference of opinion regarding the controlling questions of law decided by the July 17 Order.

3. An immediate appeal of the July 17 Order will materially advance the ultimate termination of this litigation.

WHEREFORE, for the reasons set forth above and as more fully set forth in the accompanying memorandum of law, Dey respectfully requests that the Court amend its July 17 Order to include a certification, pursuant to 28 U.S.C. § 1292(b), permitting Dey to seek leave to immediately appeal the July 17 Order to the United States Court of Appeals for the First Circuit.

Dated: July 31, 2007

Respectfully submitted,

By: /s/ Neil Merkl  
Paul F. Doyle (BBO # 133460)  
Sarah L. Reid  
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-and-

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*Attorneys for Defendants*  
*Dey, Inc., Dey L.P., Inc. and Dey, L.P.*

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(2)**

I, Neil Merkl, hereby certify that counsel for Dey has consulted in good faith with Assistant United States Attorney George B. Henderson, II, counsel for the United States, concerning this action in an effort to resolve or narrow the issues on this motion. I further certify that the United States declined to consent to the issuance of an Order certifying the July 17 Order for immediate appeal pursuant to 28 U.S.C. § 1292(b) and that the discussion between counsel did not otherwise lead to a resolution or narrowing of the issues.

/s/ Neil Merkl

Neil Merkl

**CERTIFICATE OF SERVICE**

I, Neil Merkl, hereby certify that a true and correct copy of the foregoing was delivered to all counsel of record by electronic service pursuant to Paragraph 11 of Case Management Order No. 2, by sending on July 31, 2007, a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ Neil Merkl

Neil Merkl